

GMA Update - Critical Areas Checklist Questions Explained

Each city and county in Washington state is required by the Growth Management Act (GMA) at RCW 36.70A.060 (2) to adopt comprehensive plan policies and development regulations that designate and protect critical areas.

This explanatory checklist is to help small cities and towns conduct a review of their critical areas ordinances (CAO) to see if they meet the basic requirements of the GMA. Smaller counties may also find this checklist useful in reviewing their existing CAO for possible updating.

Questions are asked to ensure that the most important components are addressed. If your CAO addresses all these issues, it probably is adequate. If you answer “No” to some of these questions, an update might be warranted. Keep in mind that this checklist doesn’t consider all possibilities and a more detailed review may be needed to determine full compliance.

Did the CAO drafting process include the public?

Explanation: In accordance with RCW 36.70A.130 (2), cities and counties must involve the public when updating their comprehensive plans and development regulations, including designating critical areas. Public participation should include outreach to land owners, interest groups, tribal governments, representatives from adjacent jurisdictions, and state agencies. Another reason to include the public is to educate them, elected officials, planning commissioners and local staff about critical areas: why they are critical, what functions they provide or support, and what values they hold for the local community. The need for public education on critical areas is never complete, as new officials are elected, new residents move into communities, and new scientific information increases our understanding of these critical areas.

Did the process to draft your current CAO “include the best available science”?

Explanation: The GMA at RCW 36.70A.172 (1) requires cities and counties to “include the best available science” when drafting policies and development regulations. Note that the GMA does not require communities to go out and conduct new scientific studies, but to include the best science that is available. Communities may refer to compilations of scientific information to locate locally appropriate science. CTED produced one such source in 2002: Citations of Recommended Sources of Best Available Science for Designating and Protecting Critical Areas. Many counties and cities have also compiled similar sources of scientific information, which may be applicable within a specific geographic area. Communities are also advised to contact the regional or state offices of the state departments of Fish and Wildlife, Ecology, and Natural Resources, for assistance with identifying science that is appropriate for their circumstances. Contacts in these agencies are listed on agency websites and in the revised CAO Handbook CD.

If a community wishes to adopt standards that are different from those indicated by the best available science, it needs to document the reason for this deviation in accordance with WAC 365-195-915. It also needs to describe how it will protect the functions and values of these critical areas, which may include the need for ongoing monitoring and adaptive management.

Was the best available science information that was reviewed documented in the record?

Explanation: In accordance with WAC 365-195-915, cities and counties should make a record of the best available science that was included in the process of drafting the CAO and related policies. The record should identify the specific policies and regulations and the relevant sources of best available science that were included in the decision-making process.

Does the local record include specific findings that are accurate and explanatory?

Explanation: The CAO should be supported with written Findings that clearly state the relevant issues addressed, the sources of scientific information used, the steps used to involve the public in the amendment process, and any remaining uncertainties that may need to be addressed in terms of monitoring and adaptive management. These Findings are to help support the adopted policies and development regulations, and are part of the local record.

Does the CAO include a purpose statement and, if so, is it consistent with the GMA and the locally adopted comprehensive plan?

Explanation: The CAO should clearly state that it is intended to protect the functions and values of critical areas and protect people, public and private property, and support a balanced ecosystem. - RCW 36.70A.170 and 172.

Does the CAO apply to all development near critical areas, irrespective of parcel boundaries?

Explanation: If the ordinance only protects critical areas that are located on the proposal site, nearby critical areas that are located off site may go unprotected from the impacts of the proposed development. To fully protect critical areas, all development that is within a specified distance should be subject to critical areas review. While a critical area may not be located on site, its protective buffer area may extend onto the site of the proposal and that buffer may require protection.

Does the CAO include a review process for those proposals that are near critical areas?

Explanation: Communities use a variety of different review procedures and there is no single right way to conduct critical areas review. Some require a critical areas permit, while others conduct critical areas review in conjunction with underlying permits. Generally, any time a proposal is near a critical area, the critical areas review process should require the applicant to submit information regarding the nature of the critical area in addition to information about the proposal. It may be appropriate to require a technical report, such as a wetland, habitat management, or geological report, that is prepared by a qualified professional. It also may be necessary to visit the site to verify what is there (e.g., stream types, wetland boundaries, steep slopes, any existing built infrastructure, etc.)

Does the CAO define “qualified professional”?

Explanation: To be consistent with the GMA requirement to protect critical areas, technical reports that define the level of protection required in specific circumstances need to be prepared by a qualified professional. This definition can vary, but it should be clear that a qualified professional is one with expertise from training and experience. For some professions, licensing is required.

Does the CAO provide a limited set of exemptions? Are those exemptions specific enough that they won't result in significant impacts to critical areas?

Explanation: Exemptions are an important component of CAOs. Without them, an excessive level of review would be required for minor activities that don't harm critical areas. However, cities and counties should be careful that exemptions do not create a loophole that allows for development that does result in impacts without requiring mitigation. Common exemptions include:

- Emergencies.
- Remodels that do not extend further into or result in additional harm to a critical area.
- Development that has already completed critical areas review under a previous permit.
- Surveying.
- Walking, hiking, or passive recreation.

Does the CAO allow for "reasonable" use?

Explanation: If the CAO precludes all development in some critical areas, such as wetlands and habitat conservation areas, it may result in the "taking" of property by preventing "reasonable" use of those properties that are completely encumbered. To comply with the U.S. and Washington state constitutional requirements to not take property without due process and just compensation, each CAO should include provisions to allow at least a minimal reasonable use of the property. This does not mean that all property is guaranteed to be developable, as there are site constraints that may prevent use, such as poorly drained soils for on-site waste disposal, or soils incapable of physically supporting buildings. A reasonable use provision should not be used as a general development permit, but as a "pressure valve" only to prevent situations that would otherwise result in property takings.

Does the CAO clearly designate all critical areas that might be found within the jurisdiction?

Explanation: The GMA requires cities and counties to designate and protect critical areas – RCW 36.70A.170. Designation is the process of clearly defining which areas are critical areas. All counties and most cities, though not all, have all five critical areas. The GMA requires local governments to designate and protect those critical areas that are present. Protecting critical areas includes the need to protect wetlands and fish and wildlife habitat conservation areas, as well as to protect public health and safety from geological and flood hazards, and from groundwater contamination of potable water supplies. Guidance is provided in Ch. 365-190 WAC for classifying and designating each of the five types of critical areas, which are wetlands; areas with a critical recharging effect on aquifers used for potable water; fish and wildlife habitat conservation areas; frequently flooded areas; and geologically hazardous areas.

Jurisdictions must formally designate critical areas by specific criteria in the development regulations, and may choose to map critical areas as they learn about their locations. While mapping known critical areas is recommended, jurisdictions should be clear that maps are advisory only and are not used to designate critical areas. This allows a jurisdiction to avoid having to demonstrate that they have comprehensively mapped all critical areas within their boundaries, which could be a resource intensive task.

Does the CAO include science-based standards to protect critical areas?

Explanation: At a minimum, the CAO should state that the functions of the critical areas must be maintained. For some critical areas this might be done by adopting buffers based on science. For other critical areas, like frequently flooded areas or geologically hazardous areas, they may need to be avoided to protect public safety, or may need standards to ensure that development allowed to occur within or near the critical areas is safe.

OPTIONAL Considerations**Does the CAO provide incentives to allow for improvements to designated critical areas and buffers?**

Explanation: Many areas that are designated as critical areas have already been altered by past development activities. In some cases, likely buffer areas are dominated by invasive plants that reduce their functional ability to protect critical areas. In other cases, small streams have been hidden underground in culverts, or have been partially blocked by undersized or poorly installed culverts for road and driveway crossings, reducing their ability to provide critically needed habitat or flood control. While such past actions are not necessarily required to be corrected, jurisdictions may want to consider using incentives to promote restoring appropriate vegetation, removing blockages to stream flows, reducing erosion potential, and installing fences or signs to enhance the functional ability of certain critical areas. Using incentives can be an effective way to create opportunities to include ecosystem improvements as part of the mitigation options available for new development activities. Encouraging ecosystem improvements through incentives to protect and enhance critical areas can include a wide variety of actions and approaches, including reduced fees, reduced setbacks, reduced stormwater utility fees, increased lot coverage, buffer averaging, off-site mitigation alternatives, and even public recognition and awards.

Does the CAO allow for compensatory mitigation of project impacts through the use of wetland mitigation banks, fee in lieu programs, or other watershed-based regional approaches?

Explanation: Current federal and state laws for wetlands protection require that any compensatory mitigation proposed to address project impacts to wetlands must document having first considered avoidance and minimization. If compensatory mitigation is needed, the most promising mitigation options can be determined by using a watershed or landscape based approach. This approach does not change the need to follow the correct sequence of mitigation, which includes avoidance, impact minimization by changing the size or location of the project, and finally, compensation for project impacts.